Public Prosecutor v Balveer Singh a/l Mahindar Singh

HIGH COURT (MELAKA) — CRIMINAL APPEAL NO 42–4 OF 2001
LOW HOP BING J
28 AUGUST 2008

Criminal Law — Prevention of Corruption Act 1961 — ss 3(a)(ii), 4(a) — Ingredients to be established — Presumption of corruption — Prevention of Corruption Act 1961 ss 3(a)(ii), 4(a) & 14

Criminal Procedure — Appeal — Fact, finding of — Whether appellate interference warranted

Evidence — Tape recording — Admissibility — Procedure for tendering tape recording in evidence

The respondent was initially charged in the sessions' court with three charges under ss 3(a)(ii) and 4(a) of the Prevention of Corruption Act 1961 ('Act'). He stood accused of corruptly soliciting and accepting gratification as inducements from taking action against foreign workers employed at the complainant's construction site. At the close of the prosecution's case, the sessions' court judge acquitted and discharged the respondent without calling for his defence. The prosecution thus appealed to the High Court.

Held, dismissing the appeal:

(1) To establish a prima facie case in respect of offences under ss 3(a)(ii) and 4(a) of the Prevention of the Act, the prosecution must establish that: (i) the accused was at the material time an agent of the Government of Malaysia; (ii) the accused had accepted gratification, in respect of the offence under s 4(a); (iii) the accused had solicited gratification, in respect of the offence under s 3(a)(ii). Upon establishing the ingredients of accepting (in respect of the offence under s 4(a) and soliciting (in respect of the offence under s 3(a)(ii)), the presumption of corruption under s 14 of the Act would then arise (see paras 4–5).

(2) There were indeed contradictions between the complainant's first information report and his evidence in court. The sessions' court judge

had not erred in holding these contradictions had weakened the prosecution's case, especially in the light of the beyond reasonable doubt standard of proof required of the prosecution (see paras 12 & 21).

(3) The trial judge had made a finding of fact when rejecting the evidence of a certain prosecution witness (SP18). The judge had arrived at this decision by assessing, weighing and for good reasons accepting or rejecting the whole or any part of the evidence placed before him. The High Court was unable to find any appealable error on the part of the trial judge in respect of such finding of fact. That finding of fact would therefore warrant no interference by the appellate court (see paras 24–25).

(4) The trial judge had rejected the evidence of certain tape recordings and transcripts adduced by the prosecution on the basis of a break in the chain of evidence; and tampering. In order to render such evidence admissible, the prosecution had to observe the procedural law and practice governing tape recordings. The procedure governing the manner of tendering a tape recording in evidence, as set out by Augustine Paul J in *Mohd Ali Jaafar v Public Prosecutor* [1998] 4 MLJ 210, may be detailed as follows: (i) the holding of a trial-within-a-trial to admit a tape recording in evidence is irregular except where its admissibility is subject to conditions such as voluntariness; (ii) the tape recording is admissible upon being tendered through its maker after proof of the matters referred to in *R v Parsons* (1977) 80 DLR (3rd) 430 viz: (a) the tape recording is an accurate reproduction on the basis of the integrity of the tape, its accuracy, its continuity and voice identification; (b) the tape has not been tampered with or altered in any way; (c) the recording tape was magnetically clean and the recording apparatus was in working order. In the instant appeal, there was no valid reason to support the admissibility of the tape recordings. The trial judge had therefore not erred in rejecting them (see paras 36–44).

(5) The prosecution had clearly failed to prove the three charges beyond reasonable doubt. The trial judge had therefore correctly acquitted and discharged the respondent on the charges without calling for his defence. The prosecution's appeal ought therefore be dismissed (see paras 45–46).

[Bahasa Malaysia summary

Responden pada mulanya dituduh di mahkamah sesyen dengan tiga pertuduhan di bawah ss 3(a)(ii) dan 4(a) Akta Pencegahan Rasuah 1961 ('Akta'). Dia dituduh secara tidak berakhlak meminta dan menerima suapan sebagai pendorong daripada mengambil tindakan terhadap pekerja warga asing yang diambil bekerja di tapak pembinaan pengadu. Di penutup kes

pihak pendakwaan, hakim mahkamah sesyen telah membebaskan dan melepaskan responden tanpa memanggil pembelaannya. Pihak pendakwaan oleh itu telah merayu ke Mahkamah Tinggi.

Diputuskan, menolak rayuan:

(1) Untuk membuktikan kes prima facie bagi kesalahan di bawah ss 3(a)(ii) dan 4(a) Akta, pihak pendakwaan perlu membuktikan bahawa: (i) tertuduh pada masa material merupakan agen Kerajaan Malaysia; (ii) tertuduh telah menerima suapan, berkaitan dengan kesalahan s 4(a); (iii) tertuduh telah meminta suapan berkaitan dengan kesalahan di bawah s 3(a)(ii). Setelah membuktikan faktor-faktor menerima (berkaitan kesalahan di bawah s 4(a) dan meminta (berkaitan kesalahan di bawah s 3(a)(ii)), andaian rasuah di bawah s 14 Akta mungkin berbangkit (lihat perenggan 4–5).

(2) Memang terdapat percanggahan antara laporan maklumat pertama pengadu dan keterangannya di mahkamah. Hakim mahkamah sesyen tidak terkhilaf dalam memutuskan percanggahan tersebut telah melemahkan kes pihak pendakwaan, terutamanya berdasarkan piawai bukti melampaui keraguan munasabah yang dikehendaki oleh pihak pendakwaan (lihat perenggan 12 & 21).

(3) Hakim perbicaraan telah membuat penemuan fakta apabila menolak keterangan saksi tertentu pihak pendakwaan (SP18). Hakim telah mencapai keputusan ini setelah menilai, menimbang dan dengan sebab wajar menerima atau menolak keseluruhan atau mana-mana bahagian keterangan yang dikemukakan di hadapannya. Mahkamah Tinggi tidak dapat menemui apa-apa kesilapan yang boleh dirayu di pihak hakim perbicaraan berkaitan penemuan fakta sebegini. Penemuan fakta tersebut oleh itu tidak mewajarkan campur tangan oleh mahkamah rayuan (lihat perenggan 24–25).

(4) Hakim perbicaraan telah menolak keterangan pita rakaman dan transkrip tertentu yang telah dikemukakan oleh pihak pendakwaan atas dasar rangkaian keterangan telah terputus; dan mengubah. Bagi tujuan menjadikan keterangan sedemikian boleh diterima, pihak pendakwaan perlu meneliti undang-undang prosedur dan amalan yang mengawal pita rakaman. Prosedur yang mengawal cara mengekuma pita rakaman dalam keterangan, seperti yang ditetapkan oleh Augustine Paul H dalam kes *Mohd Ali Jaafar v Public Prosecutor* [1998] 4 MLJ 210, boleh diperincikan seperti berikut: (i) mengadakan perbicaraan dalam perbicaraan untuk mengakui pita rakaman dalam keterangan di luar aturan kecuali jika kebolehterimaannya tertakluk kepada syarat-syarat seperti kesukarelaan; (ii) pita rakaman itu boleh diterima setelah

dikemukakan melalui pembuatnya selepas dibuktikan perkara-perkara yang dirujuk dalam kes *R v Parsons* (1977) 80 DLR (3rd) 430 viz: (a) pita rakaman itu adalah pengeluaran semula yang tepat berdasarkan integriti pita itu, ketepatannya, kesinambungannya dan pengecaman suara; (b) pita itu tidak diubah atau dipinda dalam apa-apa cara; (c) pita rakaman itu jelas dan alat rakaman itu berfungsi dalam keadaan baik. Dalam rayuan ini, tiada sebab sah untuk menyokong kebolehterimaan pita rakaman tersebut. Hakim perbicaraan oleh itu tidak terkhilaf apabila menolaknya (lihat perenggan 36–44).

(5) Pihak pendakwaan jelas telah gagal membuktikan tiga pertuduhan tersebut melampaui keraguan munasabah. Hakim perbicaraan oleh demikian betul dalam membebaskan dan melepaskan responden atas pertuduhan tersebut tanpa memanggil pembelaannya. Rayuan pihak pendakwaan oleh itu patut ditolak (lihat perenggan 45–46).]

Notes

For cases on admissibility of tape recording, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2553–2559.

For cases on finding of fact, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 395–469.

For cases on ss 3(a)(ii), 4(a) of the Prevention of Corruption Act 1961, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 395–469.

Cases referred to

Anuar Abdul Aziz v PP [2006] 1 MLJ 380, HC (refd)
Arulpragasan a/l Sandaraju v PP [1997] 1 MLJ 1, FC (folld)
Attan bin Abdul Gani v PP [1970] 2 MLJ 143, HC (refd)
Che Din bin Ahmad v PP [1976] 1 MLJ 289, HC (distd)
Eu Boon Yeap & Ors v Ewe Kean Hoe [2008] 2 MLJ 868, CA (refd)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)
Herchun Singh & Ors v PP [1969] 2 MLJ 209, FC (not folld)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97, FC (refd)
Mohd Ali Jaafar v PP [1998] 4 MLJ 210, HC (refd)
Pendakwa Raya lwn Zakaria bin Mansor [1997] 5 MLJ 505, HC (refd)
PP v Datuk Haji Harun bin Haji Idris (No 2) [1977] 1 MLJ 15, HC (refd)
PP v Foong Chee Cheong [1970] 1 MLJ 97, HC (distd)
PP v Jamil bin Mahmod & Anor [1998] 4 MLJ 681, HC (distd)
PP v Yuvaraj [1969] 2 MLJ 89, PC (refd)
R v Parsons (1977) 80 DLR (3rd) 430, CA (refd)

Shoe Swaran v King-Emperor AIR 1934 PC 227 (refd)
Simon Chua Kim Hock v PP [1994] 4 CLJ 218, HC (not folld)

Legislation referred to
Criminal Procedure Code ss 107, 317
Criminal Procedure Code [India] s 154
Evidence Act 1950 s 145
Prevention of Corruption Act 1961 ss 3(a)(i), 3(a)(ii), 4, 4(a), 14

Zulqarnain bin Hassan (Deputy Public Prosecutor, Attorney General's Chambers), (Mohd Zazamudin bin Ahmad Nawawi with him) (Anti-Corruption Agency Malaysia) for the prosecution.
Jagjit Singh (Jagjit Singh & Co) for the accused.

Low Hop Bing J:

THE CHARGES

[1] In the sessions court, the prosecution preferred three charges under the Prevention of Corruption Act 1961 against the accused. These charges concern gratification from one Ee Chong Peng ('the complainant') as inducements to refrain the accused from taking actions against the foreign workers of the complainant at his construction site, and may be tabulated as follows:

.	Date, time and place	Allegation
(1)	6 August 1996 2.30pm Klebang Beach Resort, Resort	Corruptly accepted for himself RM2,000, punishable under s 4(a)
(2)	16 August 1996 10.45am Tek PPH Batang Tiga	Corruptly solicited for himself RM2,000 punishable under s 3(a)(ii)
(3)	29 August 1996 7.00pm Straits Cafe Jalan Ujong Pasir, Melaka Tengah	Corruptly accepted for himself RM1,000 punishable under s 4(a)

APPEAL

[2] On 28 August 2001, the learned sessions court judge ('the trial judge') acquitted and discharged the accused of all the three charges at the close of the case for the prosecution, without calling for defence.

[3] The instant appeal is lodged by the prosecution against the said acquittals.

A INGREDIENTS OF THE CHARGES

[4] In order to establish a prima facie case in all the charges under s 4(a) and s 3(a)(ii), it is essential for the prosecution to prove that:

B (i) the accused was at the material time an agent of the Government of Malaysia;

(ii) the accused has, at the material time, accepted a gratification of RM2,000 and RM1,000 respectively from the complainant, punishable under s 4(a), contained in charges (1) and (3); and

C

(iii) the accused has, at the material time, solicited a gratification of RM2,000 from the complainant, punishable under s 3(a)(ii), contained in charge (2).

(See *Public Prosecutor v Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ
D 15; and *Pendakwa Raya lwn Zakaria bin Mansor* [1997] 5 MLJ 505).

[5] Upon the ingredient of accepting under s 4(a); and of soliciting under s 3(a)(ii) having been established by the prosecution, the presumption under s 14 arises ie that the respective gratification has been accepted, or solicited,
E corruptly as an inducement in relation to the principal's affairs, unless the contrary is proved: *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89; *Attan bin Abdul Gani v Public Prosecutor* [1970] 2 MLJ 143; and *Zakaria bin Mansor*.

STANDARD OF PROOF

F

[6] It is essential to note that the three charges against the accused were alleged to have taken place on 6, 16 and 29 August 1996 respectively. The law governing the standard of proof that is required from the prosecution at the
G close of the prosecution's case at the material time, is one beyond reasonable doubt, after embarking on a maximum evaluation of the evidence tendered by the prosecution: *Arulpragasan a/l Sandaraju v Public Prosecutor* [1997] 1 MLJ 1 (FC).

H AGENT OF GOVERNMENT OF MALAYSIA

[7] It was not disputed that at the material time, the accused was a chief inspector in the Royal Malaysian Police and hence an agent of the Government of Malaysia.

I

ACCEPTING: CHARGES (1) and (3)

[8] Upon a maximum evaluation of the evidence adduced at the close of the prosecution's case, the trial judge found that the accused had not accepted

the 'trap money' ie RM2,000 and RM1,000, alleged respectively in charges (1) and (3), as these sums of money were never recovered nor tendered as exhibits.

[9] In relation to charge (1), the complainant's first information report ('the report') (exh P3) stated that when he gave the RM2,000 to the accused at the resort, it was witnessed by his friend (SP18). However, while testifying in court, the complainant's evidence revealed that SP18 did not witness nor see the RM2,000 being delivered to the accused, as SP18 had, unknown to the complainant, already left the resort for another place. While it is true that SP18 did testify that he (SP18) saw the handing over of the RM2,000 by the complainant to the accused, having regard to the contradictions, the trial judge was unable to say that the prosecution has, at the close of its case, succeeded in establishing beyond reasonable doubt that the accused had accepted the RM2,000 alleged in charge (1).

[10] Testifying in relation to charge (3), the complainant said that SP5 was behind him when the complainant handed over the RM1,000 to the accused at the passage way behind a coffee shop. However, the complainant did not know whether SP5 saw the handing over of the RM1,000. Although SP5 testified that he saw the handing over, he could not say where the money had originated. In any event, notwithstanding the fact that the accused had been made to undergo a body search, the RM1,000 was never recovered from the accused. Searches conducted in the accused's office and vehicle for the RM1,000 had also proved negative. The trial judge then held that the prosecution had failed to prove beyond reasonable doubt the handing over of RM1,000 by the complainant and so there was no question of the accused accepting the money from the complainant.

SOLICITING: CHARGE (2)

[11] In relation to the alleged soliciting of RM2,000 by the accused from the complainant as stated in charge (2), the trial judge observed that the complainant had contradicted himself especially in relation to the person who was alleged to have solicited the money from him on the day in question. The complainant testified that he met with a Malay officer and not the accused whom the complainant knew as En Singh. The trial judge also noted that the complainant had several lapses of memory and could not remember well, in so far as soliciting is concerned.

CONTRADICTIONS

[12] Learned deputy public prosecutors Mr Zulqarnain bin Hassan and Mr Mohd Zazamudin bin Hj Ahmad Nawawi submitted that the trial judge

A erred in holding that there were contradictions between SP3's first information report and his evidence, as the report is merely to set the law in motion, drawing support from *Herchun Singh & Ors v Public Prosecutor* [1969] 2 MLJ 209 (FC); and *Public Prosecutor v Foong Chee Cheong* [1970] 1 MLJ 97.

B

[13] Mr Jagjit Singh, learned counsel for the accused, responded that the contradictions were blatant, and not mere omissions.

C **[14]** At this juncture, I find it useful to examine the law governing a first information report, especially the authorities relied on by the prosecution.

[15] My analysis of *Herchun Singh* cited for the prosecution, where relevant, shows that the police report made by the complainant and taken D down by a police constable was to the effect that the complainant did not know the robbers, when the complainant had actually told the police constable about the robbers. There was a finding of fact that the report contained errors and omissions for which the constable alone was responsible. In view of the omissions, Ong Hock Thye CJ (Malaya) (as he then was), who E spoke for the Federal Court, endorsed Sohoni's commentary on s 154 of the Indian Criminal Procedure Code which is equipollent to s 107 of our Criminal Procedure Code. I shall refer to the relevant portion as follows:

> ... The first information *report* is not an Encyclopaedia. It is not the beginning and ending of every case. It is only a complaint to set the affairs of law and order in F motion. It is only at the investigation stage that all the details can be gathered and filled up. But it cannot be said that omissions in the first information *report* would always be of no significance. The *report* is not substantive evidence and omissions in it will not ipso facto lead to the case being thrown out. But it is a piece of corroborative evidence; omissions in it will, other things being the same, deprive G the prosecution of the most valuable corroboration and thereby make the story suspicious.
>
> When a first information *report* contains an omission as to an important fact relied upon by the prosecution, the omission is important and in the absence of any other evidence, the court may in a given case refuse to consider the evidence of the H informant on that fact because of such omission. For a correct appraisal of the effect of omission as contradicting the informant it is essential to keep in view the circumstances in which the *report* was lodged.

I **[16]** On the first information report, the learned Chief Justice concluded with the passage below:

> *In short, it is wrong to hold up the first information report as a sure touchstone by which the complaint's credit may invariably be impeached. It can only be used for that purpose with discrimination, in much the same way as previous statements by the witness are*

used, so that irrelevant errors in detail are not given exaggerated importance, nor omissions, objectively considered in the light of surrounding circumstances.

[17] In *Fong Chee Cheong*, the complainant lodged a police report of extortion which was recorded by PW4 there. However, the learned magistrate acquitted the accused without calling for defence on the ground, inter alia, that as the complaint's report had not been reduced into writing in the first instance, the police had no power to act. On appeal, that ground was held to be erroneous. Gill J (later CJ (Malaya)) set out the relevant principles as follows:

(1) however important a document a first information report is, it can never be treated as a piece of substantive evidence;

(2) the fact that no first information report was made is not in itself a ground for throwing out a case; and

(3) generally the absence of a first information report casts a cloud of suspicion and tends to weaken the prosecution's case, and the receipt and recording of an information report is not a condition precedent to the setting in motion of a criminal investigation: *Emperor v Khwaja Nazir Ahmad* AIR 1945 PC 18, p 20.

[18] In *Anuar Abdul Aziz v Public Prosecutor* [2006] 1 MLJ 380 (HC) at pp 399–400, I enumerated the relevant principles governing a first information report, as follows:

(1) The first information report refers to the initial information relating to the commission of an offence given to the police under s 107 of the CPC, and is usually made very early after the occurrence of the offence and forms the basis of the case, upon which the police will commence their investigation (see *Mallal's Criminal Procedure* (5th Ed, 1998) p I 182 paras 4151–4152);

(2) A first information report serves as a complaint to the police to set the criminal law in motion and seeks to obtain early information of alleged criminal activity and to record the circumstances before there is time for them to be forgotten or embellished (Ibid, p I 1824, para 4176; per Lord Porter in *Emperor v Khwaja Nazir Ahmad* AIR 1945 PC 18 at p 20, as referred to in *Balanchandran v PP* [2005] 2 MLJ 301, at p 309 para 9 per Augustine Paul JCA);

(3) A certified copy of the first information report is admissible as evidence of the contents of the original ie it takes the place of the original and its evidentiary value would remain on the same footing as that of the original: *Balanchandran*, applying s 108A of the CPC;

(4) *The evidentiary value of a first information report is only to contradict the testimony of a witness under s 145 of the Evidence Act 1950; or to corroborate his testimony under s 157 of the Act, the operation of which is as explained in Lim Guan Eng v PP* [2000] 2 MLJ 577.

(5) A first information report is not substantive evidence of its contents: Balanchandran, at p 310 para 11; per Chang Min Tat J (later FJ) in Tan Cheng Kooi, at p 118; per Kang Hwee Gee JC (now J) in *Abdul Latiff*.

(6) Where the evidence of a single witness who has made a first information report is vague, it is most desirable to tender it in evidence in order to enhance his credibility: *Chin Khing Siong v Rex* [1952] MLJ 74 and *Ooi Hock Leong v Regina* [1955] MLJ 229.

(7) Where a first information report is not tendered in evidence in such a situation as in para 6 above, the evidence of the witness stands to be rejected, not because it lacks corroboration but because it may not pass the test of credibility and reliability on its own, and it is only to that extent that the failure to produce the first information report is fatal: *Balachandran*, p 311 para 12; Abdul Razak Johari, per James Foong JC (now J);

(8) If a first information report contradicts the evidence of a witness, it is the duty of the defence to use it in order to attack the credibility of the witness, and where that has not been done, it would be a contradiction in terms for the defence to ask for an adverse inference to be drawn against the prosecution for failure to adduce it in evidence, as the failure of the defence to use it as described may lead to the inference that it is not adverse to the evidence of the witness, so that an adverse inference cannot be drawn against the prosecution for failure to tender it in evidence: *Balachandran*, at p 311 para 12.

(9) A report pertaining to the arrest of an accused is not a first information report but is an arrest report: *Balachandran*, p 311 para 13.

[19] In the light of the above analysis, it needs to be noted that the omission by the police constable in *Herchun Singh* is nowhere to be found in the facts in the instant appeal; while the facts in *Foong Chee Heong* do not share any similarity with those in the instant appeal. Further, as shall be seen below, the principles enunciated in *Herchun Singh* do not really assist the contention presented for the prosecution. That being the case, I am of the view that the prosecution's garnering of support from these two authorities is without merits.

[20] With particular reference to the contradictions found in the complainant's first information report and his evidence in court, the established principles in *Herchun Singh* and *Anuar Abdul Aziz* that the first information report may be used with discrimination for the purpose of impeaching the complainant's credit; and to contradict the testimony of a witness under s 145 of the Evidence Act 1950, are of immense importance.

[21] Reverting to the instant appeal, I am of the view that the trial judge has not erred in holding that the contradictions in the complainant's police report and his evidence in court had weakened the prosecution's case, especially in the light of the strict requirement set out by the Federal Court in *Arulpragasan* in relation to the standard of proof ie beyond reasonable doubt.

CREDIBILITY OF WITNESSES

[22] The prosecution complained that SP18's evidence, that he saw the handing over of the money by the complainant to the accused, should not have been rejected by the trial judge as SP18 is a credible witness.

[23] The defence contended that SP18's evidence was that he did not actually see anything, but instead relied entirely on what the complainant had told him.

[24] In fairness to the trial judge, the complainant did testify at the trial that, in relation to the gratification under charge (1), at the material time SP18 did not witness or see the handing over of the RM2,000 by the complainant to the accused, as SP18 had by then left the resort. That accounted for the inability of the prosecution to recover and tender the RM2,000 as exhibit in court. The issue under this head is whether the trial judge can be faulted for this finding of fact based on the observation and demeanour of the witnesses who had testified at the trial.

[25] In this regard, I recollect the judgment of Ong Hock Thye CJ (Malaya) in *Herchun Singh* that:

(1) the view of the trial judge must be given proper weight and consideration; and

(2) an appellate court should be slow in disturbing such finding of fact arrived at by the trial judge who had the advantage of seeing and hearing the witness, unless there are substantial and compelling reasons

for disagreeing with the finding: see *Shoe Swaran v King-Emperor* AIR 1934 PC 227.

[26] This brings into focus the relevant principles which I have the opportunity of applying when I delivered the majority judgment of the Court of Appeal in *Eu Boon Yeap & Ors v Ewe Kean Hoe* [2008] 2 MLJ 868 as follows:

(1) An appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its conclusion.

(2) But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of evidence.

(3) In relation to judicial appreciation of evidence, a judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness test it against relevant criteria. He must also test the evidence of a particular witness against the probabilities of the case (see *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97 at p 116E (FC)).

(4) To determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence, the Court of Appeal or an appellate court is perfectly entitled to examine the process of evaluation of the evidence by the trial court. Clearly, the phrase 'insufficient judicial appreciation of evidence' merely related to such a process, and is consistent with the established 'plainly wrong test' (see *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1, pp 10–11 (FC)).

[27] In the instant appeal, I find that the trial judge had arrived at the decision on issues of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before the trial court. I am unable to find any appealable error on the part of the trial judge in so far as the finding of fact is concerned. That finding of fact would therefore warrant no interference by an appellate court.

NON-RECOVERY OF GRATIFICATION

[28] It was the prosecution's contention that in the light of exh P5 which listed the trap money, the non-recovery of the RM1,000 gratification in

charge (3) is immaterial, in view of *Che Din bin Ahmad v Public Prosecutor* [1976] 1 MLJ 289 (HC) and *Public Prosecutor v Jamil bin Mahmod & Anor* [1998] 4 MLJ 681 (HC).

[29] The defence argued that the trial judge had correctly found as a fact that the accused has never accepted the RM1,000 gratification. He relied on, inter alia, *Simon Chua Kim Hock v Public Prosecutor* [1994] 4 CLJ 218 (HC).

[30] In my analysis, *Che Din*, concerns an application under s 317 of the Criminal Procedure Code to adduce additional evidence at the hearing of the appeal. That application was dismissed. However, the facts leading to the conviction of the accused in the sessions court there would call for closer scrutiny. Two trawler boats belonging to the complainant (PW6) were detained by the appellant, a marine police corporal. The *taikong* and crew were charged with operating them without licence. While the complainant was sitting in a coffee shop, the appellant went and spoke to the complainant and threatened to make further arrests if the complainant did not pay him a sum of money. Thereafter the complainant consulted his brother, saw a lawyer and made a report to the Anti-Corruption Agency. Subsequently, as prearranged, the appellant went to a coffee shop and sat in a room with one ASP Ani. The complainant entered the room and handed an envelope containing RM130 marked notes under the table to the appellant. After taking the envelope, the appellant left the room and returned subsequently, followed by one Abdul Jalil (PW8). The complainant left the room, gave a signal to two ACA officials who came into the room. They searched the three persons and subsequently found the envelope containing the marked notes in PW8's pocket. According to PW8, the appellant had handed over the envelope to him for safekeeping when both of them went out of the shop earlier. The judgment of Syed Agil Barakbah J (later SCJ) was to the effect, inter alia, that it was not incumbent on the prosecution to prove that the money was subsequently found in the possession of the appellant, so long as the trial court is satisfied from the evidence that it was the appellant who received the money.

[31] I would pause for a moment here to observe that in *Che Din*, there was a finding of fact by the trial court on the gratification having been received by the appellant there. However, in the instant appeal, the trial judge had found as a fact that the accused had not received the gratification. Hence, *Che Din* is readily distinguishable.

[32] In *Jamil bin Mahmod*, the fact that the trap money stated in the charges under s 3(a)(ii) and s 4 had been recovered from the respondent was

not challenged. Here again, the facts are vastly different from those in the instant appeal.

[33] *Simon Chua Kim Hock*, involves an appeal by a police sergeant against conviction under ss 3(a)(i) and 4(a). PW1, PW2 and PW3 were arrested and put on remand. While in custody, the sergeant offered to secure their release in return for RM5,000. The complainant (PW1) offered to tender RM3,000 as first payment while the balance would be paid later. On the same day, PW1 lodged a report with the ACA, and a trap was laid to nab the sergeant at a restaurant. The complainant handed an envelope containing RM3,000 marked notes to the sergeant inside the sergeant's car. The complainant alighted from the sergeant's car and then gave a signal to the ACA officers who were waiting in an ambush. The sergeant drove off the car and was followed in a car by ACA officers. The car chase ended at the house of the sergeant who was then searched by the ACA officers but the RM3,000 marked notes were never recovered in his car or house or on his person. Sometime later, another ACA officer who happened to be transversing in his car but not involved in the car chase, recovered RM2,000 marked notes along the road side. The remaining RM1,000 marked notes were never ever recovered. The sessions court judge found the accused guilty and convicted him, notwithstanding the missing RM1,000 marked notes. On appeal, Ian Chin J held, inter alia, that unless the missing RM1,000 can be explained, it should cast a shadow of doubt on the allegation of PW1 that he had given the appellant the RM3,000 because if RM3,000 was given, RM3,000 should have been recovered, given the fact that the money was recovered almost immediately after it was alleged to have been thrown away by the sergeant. His Lordship also distinguished *Che Din* on the facts.

[34] Hence, I am of the view that *Che Din* and *Jamil bin Mahmod*, supra, cited for the prosecution, are far from helpful particularly the facts are concerned.

[35] My analysis of *Simon Chua Kim Hock*, plainly shows that the judgment there had indeed demolished the stand taken for the prosecution.

TAPE RECORDINGS AND TRANSCRIPTS

[36] The prosecution relied on the tape recordings and transcripts as assisting in the understanding of the contents, seeking support in *Mohd Ali Jaafar v Public Prosecutor* [1998] 4 MLJ 210 (HC).

[37] The view taken by the defence is that the two tape recordings, one taken at 5.45pm on 29 August 1996 (exh P8) and the other, at 6.05pm on the same date; the conversations (exh P10 and exhibit P11 respectively) and the transcripts (exhs P18 and P19 respectively) were inadmissible as the prosecution has failed to prove the voices and the accuracy of the two conversations.

[38] The trial judge found that there was a break in the chain of evidence relating to the tape recordings and transcripts which had been kept and taken out without any strict control and indeed had been tampered with, as a result of which the tape recordings and transcripts were rejected as evidence.

[39] In my judgment, to render the two tape recording conversations and transcripts admissible, the prosecution must observe the procedural law and practice governing tape recordings.

[40] In *Mohd Ali Jaafar*, the prosecution tendered evidence in the form of three tape recordings which were admitted by the sessions court as evidence.

[41] On appeal, the admissibility of the tape recordings and transcripts were challenged. Augustine Paul J (now FCJ) held that:

(1) the recordings played in court have not been proved to be the conversations that took place between the complainant and the accused; and hence no evidence was adduced to show that the recordings were of conversations which occurred;

(2) the authenticity of the recordings have therefore not been proved beyond reasonable doubt; and

(3) the tape recordings were wrongly admitted in evidence by the sessions court.

[42] His Lordship also set out the procedure governing the manner of tendering a tape recording in evidence. For ease of reference, I shall extract and enumerate the procedure as follows:

(1) It is irregular to hold a trial within a trial in order to admit a tape recording in evidence, except where its admissibility is subject to conditions such as voluntariness;

(2) It is admissible upon being tendered through its maker after proof of the matters referred to in *R v Parsons* (1977) 80 DLR (3d) 430 Ontario Court of Appeal, viz:

A (a) it is an accurate reproduction on the basis of the integrity of the tape, its accuracy, its continuity and voice identification;

(b) there has been no tampering nor alteration in any way;

(c)(i) the recording tape upon which the conversations were recorded was B magnetically clean; and

(ii) the recording apparatus was in working order.

[43] Reverting to the mainstream of the appeal before me, the evidence C adduced at the trial revealed that:

(1) The complainant did not testify to the content of the tapes as the true accounts of the two conversations between the complainant and the accused;

D (2) SP12 who identified his voice in exh P9 could not identify the other two voices as he had no personal knowledge;

(3) The tape recordings were played in court but the prosecution had failed to prove the voices and the accuracy of the two conversations;

E (4) SP15 admitted that the original notes which he made when transcribing the two tape recordings were destroyed in the shredder and that there were numerous differences between the conversations recorded in exh P9 and his transcript in exh P19; and

F (5) SP17 candidly confessed in court that where there were differences between the two transcripts (exhs P18 and P19) made by him and the conversations (exhs P10 and P11).

[44] In the circumstances, I am unable to find any valid reason to support G the admissibility of the tape recordings and the transcripts. Hence, the trial judge has not fallen into error in rejecting them.

CONCLUSION

H **[45]** For reasons given above, at the close of prosecution's case, in all the three charges, the prosecution has failed to measure up to the standard of proof ie beyond reasonable doubt as mandated by the Federal Court in *Arulpagasan*.

I **[46]** Hence, the trial judge had correctly acquitted and discharged the accused of all the three charges without calling for his defence. The appeal by

the prosecution is therefore dismissed and the orders of acquittal of the trial court in all the three charges are affirmed.

Appeal dismissed.

Reported by Andrew Christopher Simon